INSOLVENCY RULES 2016: EXPLANATORY NOTES
(General Points and Policy Changes)

GENERAL DRAFTING NOTE

There are individual explanatory notes for each Part of the new rules highlighting substantive changes. This note explains the drafting approach, general themes and an overview of major policy changes introduced in primary legislation and given effect in these rules.

The rules do three things. One is to consolidate the existing rules and their amendments into a single set of rules. The second is to modernise and simplify the language. The third is to incorporate various changes in the law which are intended to reduce the burden of red tape. To the extent that the rules are consolidated and recast they are not intended to change the law. Some general principles on drafting are set out below:

- The language used in the rules has been modernised and is gender neutral in accordance with current drafting practice e.g. “chairman” is now “chair”.

- A simpler, easier to understand, drafting style has been adopted wherever possible using an “active voice” e.g. “the office-holder must deliver….” instead of “a copy must be delivered by...”.

- The drafting relies on the Interpretation Act 1978 so that words in the singular include the plural and expressions in the rules have the same meaning as in the Insolvency Act 1986.

- Where provisions are stated in the Insolvency Act 1986 (the Act) they may not be repeated in the rules but we have tried to include references to the appropriate sections of the Act to assist users in identifying the full requirements.

- References to “shall” in the current rules have been replaced by “must” in the new rules in accordance with modern drafting practice which uses “must” to indicate an obligation.

- References in the rules to Parts of the Act are shown in Arabic numerals even though they appear as Roman numerals within the Act – this is also modern drafting practice.

- We have followed the principle that rules in one Part which do the same things as rules about a different procedure in another Part should so far as possible use the same wording. Also our intention is that the order of the rules in relation to different procedures should (again as far as possible) be the same.

- The draft rules use the single term “deliver” in place of references in the current rules to “send”, “notify”, “give” etc. We think this is simpler and clearer and it reflects the common approach to the delivery of documents set out in Part 1, Chapter 9. We are working to use this single terminology throughout the rules, regardless of the language in the Act. The rules rely on an interpretative provision in rule 1.34 to provide that the different terms used in the Act are all covered by “deliver” in the rules. In addition, rule 1.35 specifies that where the rules require delivery to all creditors that means to those whose address the office-holder is aware.

- The rules make an important distinction between ‘delivery’ and ‘service’ with service reserved for the most serious documents and applications or where the Act requires service. The requirements for service have been brought together in schedule 4 which contains a table listing the rules where service is required and identifying any modifications to the general application of CPR part 6.

- The rules now write out the content requirements of notices and other documents rather than relying on reference to a statutory form as currently. The concept behind the policy is that it is for the recipient of the information to say how they want to receive that information.

- In order to reduce repetition in the rules, and particularly in the content requirements of documents, the rules contain standard information for “identifying” a company, debtor, proceedings etc. The required identify information is listed in rule 1.7.

- We have made amendments to cover the issue of notification of certain events to Companies House (CH). Since the 2010 amendments, the registrar of companies has prescribed forms used for delivering documents to CH only. Where copy court orders, reports etc have to be sent to CH, the registrar has been prescribing cover sheets for these to ensure all standard contents are clear. Amendments have been made throughout rules to say that a notice (the cover sheet) has to go to the registrar with the copy document – this reflects what happens in practice and is not intended to add burdens

- The rules contain common Parts as listed below and accordingly the provisions for these procedures are no longer located in the individual Parts but in the appropriate common Part:-

Part	**Title**
14	Claims by and distributions to creditors in administration, winding up and bankruptcy
15	Decision making
16	Proxies and corporate representation
17	Creditors’ and liquidation committees
18	Reporting and Remuneration

19	Disclaimers
20	Debtors at risk of violence
21	The EC regulation

POLICY CHANGES

Insolvency was the subject of a Red Tape Challenge initiative in autumn 2012. This led to changes, which were incorporated in the Deregulation and Small Business Enterprise and Employment Acts 2015, as well as needing large numbers of changes to the Insolvency Rules. In addition the Enterprise and Regulatory Reform Act 2013 provided for the debtor application process for bankruptcy to be taken out of the court and for bankruptcy orders to be made administratively. There had also long been pressure to modernise, consolidate and make more consistent the Insolvency Rules 1986 (which had had 25 amending Statutory Instruments (SIs)). This redraft combines both objectives. The main policy changes are summarised below.

The current insolvency framework governs the administration of insolvency proceedings and provides the processes by which an insolvency officeholder deals with the assets of a debtor so that money can be returned to creditors. The current framework is not without its flaws and has not fully kept up to date as the business environment has evolved. This package of measures is aimed at addressing these shortcomings. The overarching rationale for intervention is to remove barriers to the efficient administration of insolvency proceedings. This will be achieved by modernising the insolvency framework and reducing unnecessary regulatory burdens. This will drive down the cost of administering insolvencies, resulting in improved returns to creditors.

<u>Removing meetings of creditors as the default position in insolvencies</u>

The process of having a meeting of creditors to agree a resolution in insolvency proceedings dates back to the second half of the 19th Century, when the insolvency law framework as we know it today was established. Methods of communication now in use would have been unrecognisable as such at that time, but few steps have been taken to modernise the methods by which office-holders engage with and seek the views of creditors.

At a meeting of creditors, attendees are able to vote on proposals and give their approval to the office-holder for certain actions, for example agreeing a voluntary arrangement proposal, approving an office-holder’s release from office, or approving the office-holder’s remuneration. Proposals approved at meetings are often clearly in the best interests of the creditors, and holding the meeting is an unnecessary formality; because of this meetings are often poorly attended, or sometimes not attended at all, and the cost of this often unnecessary process is borne by creditors through expenses incurred by the office-holder. Provisions are already in place for these meetings to take place remotely, but these provisions are little used (see below).

The SBEE Act has amended the process so that a physical meeting will not be the default mechanism for seeking the approval of creditors to proposals in insolvency proceedings and will result in a reduction in the number of physical meetings of creditors that will be held.

In most cases the office-holder will be able to use a process of deemed consent, where they write to creditors with a proposal, and provided that they receive objections from 10% or less of creditors by value then the proposal will be deemed to be approved. In the event that 10% or more of creditors object to the proposal then the office-holder will use an alternative decision making process.

Deemed consent will not be available for a limited number of processes, which will instead need to be dealt with using alternative decision making processes. Those processes are:

- approval of an individual or company voluntary arrangement,
- removal of an office-holder, and
- approval of an office-holder's remuneration.

It is not anticipated that there will be any cost to using the deemed consent process over and above what would have been incurred had the office-holder sent notices to creditors in advance of a meeting because under most circumstances the office-holder will not be required to do anything further after the notices have been sent, and so the estimated savings from not holding the meetings are calculated only on the cost of room hire and time taken to hold them.

Although a creditor with less than 10% of the total value of creditors' claims will not be able to unilaterally prevent proposals which have been presented using the deemed consent procedure, they will still have the facility to object to them and raise any concerns with the office-holder, who will in turn have a duty to consider whether deemed consent is the most appropriate mechanism to use. Small creditors will not have to liaise with other creditors with a view to raising a collective objection in order to achieve the 10% threshold – it will be up to the office-holder to assess whether the threshold has been reached. Therefore it is not considered that smaller creditors will be disadvantaged by this measure, particularly given the processes which are excluded from deemed consent (see paragraph above).

The form that an alternative decision making process takes will be at the discretion of the office-holder, with one exception. An office-holder may only call a physical meeting of creditors if (and only if) this has been requested by 10% or more by value of the creditors, 10% of the total number of creditors, or 10 individual creditors, and it is open to them to do this at any time that their consent or approval is sought. This means that the expenses of calling a physical meeting will be incurred and charged to the insolvency estate only where creditors have asked for this to happen, so unnecessary charges will be prevented. The thresholds for requiring a physical meeting of creditors are contained within the primary legislation.

Otherwise office-holders may decide to use remote meetings, correspondence, a method of electronic voting, or any method by which they can engage with creditors without a physical meeting taking place. Future regulation by insolvency practitioners' regulatory bodies will include assessment of the extent to which office-holders are providing value for money by using the most appropriate mechanism for decision making.

A further measure to cut red tape during the process whereby the creditors decide on the appointment of a liquidator in creditors' voluntary liquidation proceedings is also implemented, which is that where a meeting is held, be it virtual or physical, there will no longer be a requirement for any liquidator nominated by the company to attend in person.

Abolition of final meetings

Final meetings of creditors in liquidation and bankruptcy proceedings are held to allow the office-holder to give a concluding report on the administration of the insolvency proceedings. The office-holder would normally obtain their release from office upon reporting the outcome of the meeting to the Registrar of Companies (liquidation) or the court (bankruptcy), but creditors may resolve against the release at the final meeting, in which case they would need to seek their release by application to the Secretary of State (the effect of the release is that the office-holder's liability for the administration of the proceedings ends). However these meetings have been found to have little value and are rarely, if ever, attended by creditors.

Provisions in the SBEE scrap all final meetings of creditors where they occur – creditors' voluntary liquidation, compulsory liquidation where someone other than the official receiver is liquidator, and bankruptcy where someone other than the official receiver is trustee. Final meetings of members (shareholders) in members' voluntary liquidations will also be scrapped. It will still be necessary for the office-holder to engage with creditors by sending them a copy of the final account of the administration, and creditors will continue to be able to object to the release of the office-holder upon receipt of that document by notifying the office-holder of their objection.

Opting out of further correspondence

It is important that creditors are kept informed of the progress of insolvency proceedings, and the legislation provides that they receive notices such as the results of decision making processes, progress reports, and receipts and payments accounts from the office-holder.

In some cases individual creditors may form the opinion that they have limited interest in the progress of the proceedings because it has become clear that there is little or no likelihood of a return to them. In those cases receipt of the notices may add little value in terms of their engagement in the proceedings, and add to the administrative cost of the creditor in dealing with the notices. This proposal allows creditors to opt out of receiving further correspondence. Upon receiving this notification there will be an obligation on the part of the office-holder to send no further correspondence to that creditor.

Notices of intended dividends (payments to creditors) will not be subject to this provision, and if a creditor has previously opted out of receiving further correspondence then they will still receive such notices if issued by the office-holder. The creditor will be able to opt back in to receiving correspondence at any time.

This will reduce unnecessary paperwork from being produced and issued by the insolvency office-holder and being disposed, unread, by the creditor. It will apply across all insolvency proceedings.

Allowing an office-holder to pay a dividend in respect of a debt of less than £1,000 without the need for the creditor to submit a formal claim

To receive a dividend in an insolvency, a creditor must first submit a claim to the office-holder, which must contain certain statutory information. The office-holder may ask for further evidence from the creditor if thought necessary. Such claims must be scrutinised by the office-holder prior to distribution of any available dividend.

This measure will streamline the process of distributing funds from an insolvent estate by reducing the cost on the creditor of claiming money and on the insolvency office-holder in verifying claims and of the distribution itself.

Where an office-holder is able to rely on information contained in the company or bankrupt's statement of affairs or accounting records, the office-holder may treat debts recorded for amounts below the prescribed limit of £1,000 as proved, without requiring the creditor to prove in the normal way. In such cases the office-holder will communicate with the creditor concerned, notifying them that they will treat their debt as proved based on the amount recorded in the statement of affairs or accounting records and will pay a dividend to that creditor unless the creditor notifies the office-holder the debt is inaccurate or no debt is owed. Where the amount is inaccurate the creditor will have to prove in the normal way if they wish to receive a dividend.

Official receiver to be appointed trustee on the making of a bankruptcy order

The Insolvency Act 1986 currently provides that when the court makes a bankruptcy order the OR is appointed receiver and manager of the bankrupt's estate unless the court appoints an IP. This means that the OR's duties are limited to protecting the estate and dealing with any urgent realisations of assets that are required pending the appointment of a trustee. In many bankruptcy cases it is the OR who is subsequently appointed as the trustee, who then has full powers to deal with all the assets.

The initial appointment as receiver and manager has not been shown to have any practical benefit in the administration of bankruptcy cases and serves to delay the realisation of assets. This measure operates to change the process so that the OR is appointed trustee on the making of the order, unless the court orders otherwise.

Electronic communication and use of websites

Currently, where a debtor and a creditor have been corresponding electronically prior to insolvency, an office-holder cannot continue to correspond with the creditor in that way – he/she must obtain the creditor's written consent that that mode of communication continue. Stakeholders suggested that this is a big barrier to e-communications and did not reflect the way the business world operated (even more so than in 2010 when e-communications were first permitted). The rules change this so that where email was customarily used before the insovlency, that that method of communication can continue post insolvency with the office-holder. This will help encourage e-communication, which is generally cheaper and speedier than traditional post.

Currently, for an office-holder to put all future correspondence on a case on a website, he or she must obtain an order of the court. The requirement to go to court is being removed – where a website will be used to deliver information to creditors, an office-holder will only have to send a notice to them stating that all future correspondence will be on a website. Exceptions to this are documents that require personal service, a notice of declaration of a dividend or a notice that is not delivered generally (e.g. a bespoke letter to one creditor only would not be able to be delivered in this way).

<u>Victims of violence</u>
When a person is made bankrupt, a debt relief order is made against them, or they enter into an individual voluntary arrangement with their creditors, their address is published (on the individual insolvency register). If a person is concerned that this publication may lead to violence against them or a member of their family then they apply to the court for an order that the address be withheld.

Stakeholders (in particular Citizens Advice) have suggested that not knowing whether a court will grant this order may be a barrier to a person seeking debt relief. (This point was raised in response to the DRO review.)

The rules will now allow a person considering applying for a DRO, bankruptcy or an IVA to apply to court for an order that their address be withheld ahead of applying for an insolvency solution.

<u>Amendment of description in bankruptcy</u>
Currently, if the official receiver becomes aware that the debtor's details included in the petition and bankruptcy order are incorrect or insufficient he or she may apply to the court for an order "amending the full title of the proceedings".

When the new debtor bankruptcy application procedures come into force, there will be no provision for a formal amendment of the title of the proceedings in the bankruptcy order. If the details contained in the debtor's bankruptcy application prove to be insufficient, the official receiver may amend the description used in notices and letters to assist identification of the debtor.

We believe that a similar approach should be adopted in creditor petition bankruptcies. Applications to the court to amend the title of proceedings are dealt with administratively by the court staff but take up valuable time and resources at both the courts and official receivers' offices. It would therefore reduce costs if we could remove the requirement for a court order to amend the title in creditor petition bankruptcies too.

Notification to preferential creditors
Where an administrator thinks the level of remuneration fixed by creditors is insufficient or the basis inappropriate, s/he may apply to court (ultimately). If there is no creditors' committee the notice of the application must be delivered to one or more of the creditors as the court may direct. However, in an administration where a dividend to unsecured creditors is not expected, notice must go to all secured creditors and – where there is expected to be a distribution to them – all preferential creditors, such as employees. This can be quite a burden, as individual notice would be required to all such creditors. The new rules say that notice should continue to be given to all secured creditors (who are informed creditors, generally with a good control over fees) and should be given to those preferential creditors who have engaged with the process – in other words those who will have voted on the remuneration in the first place that the administrator is now seeking to revise. We believe that this will reduce the burden on the office-holder who may be dealing with several employees who are not interested in engaging with the process, but ensures that those who wish to be part of the process are kept informed.

Payment of dividends
Payment of dividends may be postponed where complicated matters arise in cases that need to be resolved prior to the distribution being made.

Appointment of insolvency practitioner as interim receiver
The Deregulation Act 2015 amends section 286 of the Insolvency Act 1986 to permit the court to appoint the official receiver or any insolvency practitioner as interim receiver in all circumstances. It also provides that any type of interim receiver (whether or not the official receiver) may make an application to the court for the appointment of a "special manager" (someone, usually with specific sector expertise, to assist the interim receiver). The rules now implement this policy.

Statement of affairs
Statements of Affairs contain full details of all creditors, including their names and addresses, and the amounts of their claims. These details will include any employees or ex-employees owed money by the insolvent party for wages etc, and also any customers who may have made advance payment for goods or services.

In some corporate proceedings the Statement of Affairs must be filed with the registrar of companies, which leads to those details being placed in the public domain and therefore available to anyone. This has led to concerns over protection of privacy and identity theft.

The rules now require that where a Statement of Affairs is to be filed with the registrar, details of employees, ex-employees, and customers must be contained within a separate schedule, and only a summary will appear in the body of the document. That schedule will be removed before the Statement of Affairs is filed. Administration proposals will not contain details of those creditors.

Additionally the rules implement a Deregulation Act measure that relaxes the requirement for a person who is subject to a bankruptcy order made on the petition of a creditor to provide a Statement of Affairs to the official receiver. The relevant information is usually provided by other means, but the official receiver will still be able to require submission of a Statement of Affairs from the individual if one is needed for purposes of bankruptcy administration or investigation.

Voluntary Arrangements

The rules on time recording information (r2.47 and r8.38) have been amended so that they will only apply where the remuneration of the nominee or supervisor has been agreed and paid on the basis of the rates agreed and the time spent.

The current 1986 rules (r4.21A and 6.46A) which allowed for reasonable expenses of a voluntary arrangement to be paid in priority to liquidation or bankruptcy expenses have been removed. This is to bring these procedures in line with voluntary liquidation, which did not have this rule.

Reform to the process by which debtors apply for bankruptcy

All applications for bankruptcy on the petition of the debtor will be submitted to an Adjudicator, who will be a person appointed to that role by the Secretary of State. An administrative system that allows debtors to submit their bankruptcy applications to an Adjudicator rather than present a petition to the court would facilitate efficiencies.

All applications by debtors for their own bankruptcy are, by their nature, made voluntarily and with the consent of the party who will receive the relief that is provided by an order being made. It is proposed that applications for such orders will be made to the Adjudicator and that the Adjudicator will make the orders administratively.

Applications by creditors (and certain other third parties who are currently entitled to petition for an individual's bankruptcy), in respect of debtors will continue to be presented to and determined by the court as they are now.

The proposals relate solely to the processing of applications for bankruptcy up until the bankruptcy order is made and not the administration of the bankruptcy post-order. No changes are therefore proposed to the cost or process of bankruptcy once the order has been made.

Removing such petitions from the courts would both free up court time to deal with court processes which do require judicial input, and facilitate a swift start to the case administration process for the official receiver.

EXPLANATORY NOTES

The Parts of the draft rules are listed in the table below and explanatory notes are provided for each. The draft includes eight schedules at present but these have not been completed. Schedules 5 & 6 contain the information to be provided by a debtor in a bankruptcy application.

List of Parts

PART NUMBER	TITLE OF PART
1	Interpretation, Time and Rules about Documents
2	Company Voluntary Arrangements (Part 1 of the Act)
3	Administration
4	Receivership
5	Members’ Voluntary Winding Up
6	Creditors’ Voluntary Winding Up
7	Winding Up by the Court
8	Individual Voluntary Arrangements (Part 8 of the Act)
9	Debt Relief Orders (Part 7A of the Act)
10	Bankruptcy
11	Bankruptcy Restrictions and Debt Relief Restrictions Orders and Undertakings and Insolvency Registers
12	Court Procedure and Practice
13	Official Receivers
14	Claims by and Distributions to Creditors
15	Decision Making
16	Proxies and Corporate Representation
17	Creditors’ and Liquidation Committees
18	Progress Reports and Remuneration
19	Disclaimer
20	Persons at risk of violence and non-disclosure of addresses
21	The EC Regulation
22	Permission to Act as Director etc. of Company with a Prohibited Name (Section 216)